BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL P. WILLIE Claimant	)	
VS.	)	
HERRMAN'S EXCAVATING, INC. Respondent	)	Docket No. **1,050,860**
AND	)	
CINCINNATI INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the February 11, 2011, preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

ISSUES

A preliminary hearing was scheduled for August 4, 2010, on claimant's allegation of bilateral knee injuries due to repetitive trauma during the course of his employment from 1994 through 2009. Claimant requested medical treatment including total knee replacement surgery. On the hearing date the parties agreed that respondent would provide claimant with a list of three physicians from which claimant would select an authorized physician. The agreement was memorialized by the ALJ's Order dated August 5, 2010. The Order indicated claimant was entitled to medical care and directed respondent to provide a list of three physicians from which claimant would select his authorized treating physician. A list of three was provided and claimant selected Dr. Joseph Mumford.

Respondent's counsel then sent a letter to Dr. Mumford dated September 16, 2010, which provided a history of claimant's complaints and noted the doctor was authorized to evaluate and provide treatment if the doctor found a causal relationship between the need for total knee replacement and claimant's work-related injuries or employment. A series of questions were then posed to the doctor regarding claimant's diagnosis and the relationship between that diagnosis and claimant's employment, whether a total knee replacement was necessary, whether claimant would need such a procedure without regard to employment activities and if no treatment was necessary a request for a rating.

Claimant testified that when he saw Dr. Mumford he was told that the doctor was not going to treat his left knee because the insurance company had said they were not going to authorize any payment. Consequently, another preliminary hearing was scheduled on claimant's repeated request for medical treatment, specifically bilateral knee replacement surgery.

The Administrative Law Judge (ALJ) again determined claimant was entitled to medical care and authorized Dr. Mumford as claimant's treating physician to provide medical treatment including a total left knee replacement. But the ALJ denied the request for a total right knee replacement as the ALJ determined no medical evidence was provided that such treatment was for a work-related injury.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment with respondent and whether claimant's need for knee replacement surgery is the natural and probable consequence of any compensable injury.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the time of the preliminary hearing, claimant was 60 years old. He began working for respondent on February 1, 1986. Claimant testified that he has weighed over 300 pounds for the last 10 years. For 20 years claimant's job was hauling equipment to and from the job sites using a semi-truck. But claimant began having a lot of problems with his knees so he took a different job which was operating heavy equipment. This job required climbing in and out of equipment multiple times a day. His last day worked was October 5, 2009. On October 6, 2009, respondent's secretary recommended that claimant seek medical treatment for his knees at Med-Assist. Dr. Ron Huffman diagnosed claimant with an acute left knee strain and took claimant off work. The doctor referred claimant to an orthopedist to rule out internal derangement.

Q. What necessitated you being sent to Med-Assist October 6, 2009?

A. My knee just finally give out and it just wouldn't go no further.

Q. Did you say knee or knees?

A. Knees. Well, the left one is the worse one.

Q. What are you claiming that you did at work that has caused problems with your knees?

> A. Climbing, rooting through mud, walking on twisted tough ground, just getting in and out of machines and stuff all the time.[1]

Claimant testified that his knees gradually worsened over the years until his last day worked for respondent. He further testified that he notified respondent regarding both of his knees but that the left was worse than the right. In 1994 claimant was taken by respondent's owner to see Dr. McCoy regarding his right knee. Claimant received an injection in his right knee. He continued to receive injections and was taken off work a week and then returned.

On October 5, 2009, claimant was getting off the loader when he twisted his left knee and had severe pain. As previously noted, respondent sent claimant to MedAssist where x-rays were taken. Claimant was then referred to Dr. Craig Vosburgh who recommended a left total knee replacement. Claimant was then sent to Dr. Donald Mead and was provided physical therapy. An MRI revealed moderate degenerative change with chondromalacia, joint effusion, torn lateral meniscus and anterior cruciate ligament. The claimant was then transferred to Dr. Kenneth Wertzberger.

On January 10, 2010, Dr. Wertzberger performed a partial medial and lateral meniscectomy on claimant's left knee. Claimant was found to have grade IV chondromalacia of the medial compartment, grade III of the patellofemoral joint, and a large loose body which was embedded in the posterior medial compartment. The doctor ordered physical therapy and steroid injections. Claimant received temporary total disability compensation from October 5, 2009, until he was released by Dr. Wertzberger to return to work on April 13, 2010. At which time claimant had reached maximum medical improvement. A total knee replacement was recommended. In a letter dated June 22, 2010, Dr. Wertzberger stated:

> With regard to your letter of 5/4/2010, the answer to question number one is that the future knee replacement is <u>not</u> due to the workers' compensation injury but rather due to the aging process.[2]

At the request of claimant's attorney, Dr. Edward Prostic examined and evaluated claimant on June 18, 2010. Dr. Prostic noted claimant had a history of difficulties with both knees for many years and had steroid injections to both knees in the past. Upon physical examination, Dr. Prostic found claimant's right knee had mild to moderate effusion with mild flexion contracture and the left knee had a range of motion of -20 degrees to 80 degrees with diffuse tenderness and moderate intra-articular effusion. AP and lateral x-rays revealed varus malalignment and complete loss of joint space medially and also degeneration of the anterior compartment. The doctor opined that during the course of

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[1] P.H. Trans. at 14.

[2] *Id.*, Ex. A.

employment claimant sustained injuries to his left knee which aggravated pre-existing degenerative disease. Dr. Prostic further opined claimant was temporarily and totally disabled until he has a good response to left total knee replacement arthroplasty.

On October 20, 2010, Dr. Mumford examined and evaluated claimant's left knee due to pain. Upon physical examination, the doctor noted claimant walked with an antalgic gait sparing the left lower extremity. X-rays revealed end-stage tricompartmental osteoarthritis of the left knee which was Dr. Mumford's diagnosis as well. In a letter dated November 12, 2010, to respondent's counsel, Dr. Mumford stated in pertinent part:

> I evaluated Mr. Willie on October 20, 2010, at which time he presented with end-stage osteoarthritis of the left knee, which had not responded to standard conservative efforts.
>
> He [claimant] does give a history of repetitive series of injuries throughout his course of employment at Herrman's Excavating. I did not receive any history of a ligamentous injury rendering the knee unstable, or documented cartilage or meniscal injury. Either of these two conditions may predispose the knee to osteoarthritis. It is my opinion that his osteoarthritis and the need for surgery cannot conclusively be made on the basis of his work activities. More likely his osteoarthritis is related to familial factors and his large body habitus.[3]

Claimant's counsel then sent Dr. Mumford a letter and asked whether claimant's need for a total knee replacement of the left knee was either aggravated or accelerated by his work activities. In a letter dated December 10, 2010, to claimant's counsel, Dr. Mumford stated:

> I evaluated Mr. Willie on October 20, 2010, at which time he presented with end-stage osteoarthritis of the left knee, which had not responded to standard conservative efforts. It is my opinion that his work activities are not the underlying cause of his end-stage osteoarthritis. However, these work activities have aggravated this underlying condition.[4]

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

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[3] *Id.*, Ex. A.

[4] *Id.*, Cl. Ex. 1.

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[9] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[10]

Dr. Mumford the authorized treating physician opined that claimant's October 5, 2009 accident at work aggravated a preexisting degenerative condition in his left knee. Doctor Mumford initially stated that claimant's osteoarthritis and the need for surgery could

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[5] K.S.A. 2010 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[9] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

not conclusively be made on the basis of his work activities. The doctor further opined that is was more likely claimant's osteoarthritis was related to familial factors and his large body habitus. But following a letter from claimant's counsel Dr. Mumford then stated that although claimant's work activities were not the underlying cause of his end-stage osteoarthritis nonetheless the work activities aggravated the underlying condition. Dr. Mumford's answer, in light of claimant's counsel's question, establishes that the work activities aggravated the underlying osteoarthritis condition which now requires a total knee replacement. This Board member finds the claimant has met his burden of proof to establish that he suffered accidental injury arising out of his employment and that claimant's need for left knee replacement surgery is the natural and probable consequence of his work-related injuries.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated February 11, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

[11] K.S.A. 44-534a.

[12] K.S.A. 2010 Supp. 44-555c(k).